IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No.259 of 2006
in
Suit No.1711 of 1986

Hemant Vithaldas Patel ..Appellant
vs
Ahmed and and Ors. ..Respondents

Mr H.S.Thakkar for the appellant.
Ms J.P. Thakkar for respondent No.l

CORAM: KSHITIJ R. VYAS, C.J., &
ABHAY S. OKA, J.
DATE: JULY 6, 2006.

P.C.:-

The appellant/original defendant No.3 in Suit No.1711 of 1986 has challenged the order dated 12th January, 2004, which reads as under:

"The suit already stands decreed in terms of the order dated 29th November, 2003 read with order dated 17th December, 2003".

On November 29,2003, the learned Judge granted time to Mr Kishor Patel, the proprietor of defendant No.1 to engage advocate and to file written statement before the next date i.e. 16Th December, 2003, on his paying cost of Rs 5000/- as condition precedent. It was observed that if the costs are not paid and written statement is not filed within the aforesaid

period, there shall be a decree in favour of the plaintiffs and against the defendants under Order VIII Rule 10 of the Code of Civil Procedure for a sum of Rs.2,73,189.63 with interest on the principal amouint of Rs.2,22,105.91 at 12% per annum from the date of the suit till realisation and costs. Thereafter on 17th December, 2003, the learned Judge observed that Shri Kishorbhai Patel, partner of defendant No.1 firm appeared in peson while the learned counsel Mr. Rustomji with Mr. Gidwani for the defendants were present in the court when he passed the conditional order dated 29th November, 2003. The written statement was not filed nor the cost paid. However, the learned Judge observed that the learned advocate for the defendants, who were present, stated that the condition of the defendant is financially poor, and therefore time be granted. The court on humanitarian grounds granted time upto 6th January, 2004. It was clearly observed that if both the conditions by that time are not fulfilled, decree to stand as it is. Since the defendants failed to deposit the amount and failed to file written statement as ordered, the impugned order dated 12th January, 2004 came to be passed.

The only contention advanced by the learned counsel appearing for the appellant is that the appellant was not aware about the suit having been filed in the year 1986.

According to the learned counsel, no summons was served to the appellant and, therefore he could not engage advocate. We have called for the record and proceedings of the case. Having examined the same it clearly appears that the appellant has, by making the aforesaid statement, clearly tried to mislead this court. It appears from the record that on 22nd July 1986 Mr C.C. Chhaya, advocate, filed vakalatnama for all the three defendants, the appellant has signed the said vakalatnama for defendant No.3 and when the said document was shown to him, same was not disputed by him. In view of this it cannot be contended that no summons was served on the appellant and, therefore failed to file his appearance. In our opinion, Mr Chhaya appeared for all the defendants in the proceedings. Not only that, but subsequently, it appears that on one occasion one Mr. Gidwani has also appeared for the defendants. In view of this we do not find any merit in this appeal and same is dismissed.

CHIEF JUSTICE

ABHAY S. OKA, J.